H.R. 1961—TO AMEND SECTION 16 OF THE SMALL BUSINESS ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON SBA AND SBIC AUTHORITY, MINORITY ENTERPRISE AND GENERAL SMALL BUSINESS PROBLEMS

OF THE

COMMITTEE ON SMALL BUSINESS HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

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H.R. 1961—TO AMEND SECTION 16 OF THE SMALL BUSINESS ACT

THURSDAY, JUNE 27, 1985

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON SBA AND SBIC AUTHORITY, MINORITY ENTERPRISE AND GENERAL SMALL BUSINESS PROBLEMS, COMMITTEE ON SMALL BUSINESS,

Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2359-A, Rayburn House Office Building, Hon. Parren J. Mitchell, (chairman of the subcommittee) presiding.

Mr. MITCHELL. Good morning. Our hearing will come to order.

Certainly, it is necessary in the national interest to promote the development of small and disadvantaged business concerns, and we have been attempting to do that for a number of years. However, I think our national interest is being violated and being violated deliberately and willfully by some selfish, greedy, and avaricious people who misrepresent their status in order to participate in the small business programs or disadvantaged programs legislated by the Congress.

It is important to remember that the legitimate small businesses that are disadvantaged are not the only victims of this kind of avarice. The Government is also a victim because it violates the policies of the Government to promote and develop socially and economically disadvantaged businesses.

I think it is time that we took some action. I think that it is time to make the punishment fit the crime a little better. I take the position that we are not absolutely inundated with front companies. There are some, but certainly it is not of the scope and magnitude that some would suggest that it is in order to destroy our program.

In order to better make the punishment fit the crime, I have introduced legislation, H.R. 1961. It would amend section 16(a) of the Small Business Act. That is the section that makes it a crime to knowingly make a false statement or to willfully overvalue any security in order to obtain an SBA loan, extension, or deferment, or to obtain acceptance, release, or substitution of security, and so forth. All of you are familiar with that provision.

At the present time, that offense is punishable by a fine of $5,000 and/or imprisonment for not more than 2 years.

Those provisions came into being in 1953, when the act was first implemented. The legislation that I propose would increase the maximum fine to $50,000 and the maximum term of imprisonment to 5 years. In addition, my legislation would amend the subsection

to state specifically that it is also a crime to knowingly make a false statement for the purpose of obtaining a contract or a subcontract, subject to the provisions of the Small Business Act. It is really my desire to make sure that this coverage would, of course, extend to 8(a) contracts and small business set-aside contracts, as well as subcontracts awarded under the subcontracting plans required pursuant to section 8(d).

I do not think I need to go more in detail. I have an opening statement that I will submit in its entirety for the record. Copies of my opening statement are available to those who would want to read it in more detail.

[Mr. Mitchell's opening statement follows:]

OPENING STATEMENT OF CHAIRMAN MITCHELL

It is within the vital economic interests of the United States to promote the development of small and small disadvantaged business concerns. It is only through such development that we avoid market concentration and all of the concomitant evils of centralized economic power. Competition is our primary defense against these assaults on our economic system. In fact, section 2 of the Small Business Act tells us that: "The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation." With specific reference to minority business, the statute states that: "It is in the national interest to expeditiously ameliorate the conditions of socially and economically disadvantaged groups" and that the expansion of businesses owned by these groups benefits the United States by, among other things, expanding sources of supply and "encouraging competition."

These National interests are being violated—deliberately and willfully—by a handful of avaricious people who would misrepresent their status in order to participate in a small business or a disadvantaged business program legislated by the Congress. It is important to remember that legitimate small and disadvantaged business people are not the only victims of these heinous acts. The Government is also a victim; it is our policies that are violated; our interests that are thwarted; and our goals of competition and economic equity that are rendered subservient to the greed of these unscrupulous individuals.

It is time that we make the punishment fit the crime and that we clarify those actions which would constitute an offense under our laws. My bill, H.R. 1961, is an attempt to achieve these purposes.

H.R. 1961 would amend section 16(a) of the Small Business Act. That subsection makes it a crime to knowingly make a false statement or to willfully overvalue any security in order:

(1) To obtain an SBA loan, extension, or deferment;

(2) To obtain the acceptance, release, or substitution of security or to otherwise influence the action of the SBA; or

(3) To obtain money, property, or anything of value under the Small Business Act.

An offense under this subsection is punishable by a fine of $5,000 and/or imprisonment for not more than 2 years. These provisions were enacted in 1953 as part of the original Small Business Act.

My bill would increase the maximum fine to $50,000 and the maximum term of imprisonment to 5 years. In addition, my bill would amend the subsection to state specifically that it is also a crime to knowingly make a false statement for the purpose of obtaining a contract or subcontract subject to the provisions of the Small Business Act. It is my firm intent that this coverage would, of course, extend to 8(a) and small business set-aside contracts, as well as subcontracts awarded under the subcontracting plans required pursuant to section 8(d). Lastly, my amendment would extend these criminal provisions to any other program which references the definition of "social and economic disadvantage" found in section 8(d) of the act. At present, there is only one other program which utilizes the 8(d) definition—the 10-percent set-aside required by section 105(f) of the Surface Transportation Assistance Act of 1982 (Public Law 97-424).

Under H.R. 1961, any false statement knowingly made to any party for the purpose of obtaining an 8(a) contract, a small business set-aside, a subcontract awarded under a section 8(d) subcontracting plan, or a contract awarded under the 10-per-

cent set-aside of the Surface Transportation Assistance Act of 1982, would be a crime punishable by a fine of $50,000 and/or a jail term of 5 years.

Before concluding my opening statement, I believe it necessary to reference one other provision of existing law. Section 1001 of title 18 of the United States Code makes it a crime to knowingly and willfully make a misrepresentation regarding a material fact in any matter within the jurisdiction of a Federal agency. Accordingly, the same conduct that violates section 16 of the Small Business Act may also constitute a violation of 18 U.S.C. sec. 1001. Despite the fact that 18 U.S.C. sec. 1001 is a general "anti-fraud" statute, there are two sound and compelling reasons for having specific statutory provisions addressing small business programs only. First, the penalty for a violation of section 1001 is a maximum fine of $10,000 and/or imprisonment for not more than 5 years. In my opinion, it is totally appropriate for the Congress to legislate more severe penalties for specific types of fraud it finds particularly reprehensible. I would rank the theft or attempted theft of small and minority business program benefits among the most reprehensible of all types of economic fraud.

Second, the general language of 18 U.S.C. Sec. 1001 makes it unclear as to how well suited this provision is to reach specific subcontract or grant situations where the misrepresentation is made to other than the Federal Government and, in fact, on a level far removed from the purview of the Federal Government. I, therefore, believe it necessary to specify in clear terms those exact situations which the Congress intends to fall within the range of prohibited activity.

H.R. 1961, I believe, is totally responsive to both these concerns.

I would like to thank our witnesses for appearing on such short notice and look forward to receiving their testimony. I realize that we are considering extremely grave matters, but I simply refuse to stand by while a few greedy people sacrifice the integrity of our programs for their own personal gain. I call upon out witnesses to join me in this effort and I am extremely anxious to receive the benefit of their deliberations.

[Mr. Addabbo submitted the following statement for insertion in the hearing record:]

OPENING STATEMENT OF HON. JOSEPH P. ADDABBO, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, I commend you for introducing and holding hearings on H.R. 1961, a bill that would increase the penalties for the establishment of a minority front company in order to benefit from minority business procurement programs.

These programs exist for the purpose of assisting minority businesses in overcoming their social and economic disadvantage status in the economic mainstream. However, despite the legislative intent of these programs there are those few who deliberately thwart the will of Congress by siphoning the benefits of MBE programs from the truly legitimate minority business concerns.

While minority front companies are not as prevalent as some may want us to believe, the share of Federal dollars coming through the MBE programs is so meager that we cannot sit idle and allow a few covetous people to effectively impugn the integrity of these programs.

I, therefore, support the thrust of this legislation and would urge an expeditious consideration of this measure.

Mr. MITCHELL. I would like to hear from our two agencies now. We will ask both of you to come up. That is Mr. Webber, the general counsel for the Small Business Administration; Mr. Isaiah Washington, the acting Associate Administrator for Minority Small Business and Capital Ownership Development; Jim Marquez, the general counsel for the Department of Transportation.

We thank you very much for being here with us. I hope to be able to do this in a very expeditious manner. We are in session today and the House is going in at 10 a.m. You gentlemen represent two of the agencies that are very much involved in socially

and economically disadvantaged business opportunity programs, and I wanted to get your reactions to the legislation which I would propose. At this point I will insert a copy of H.R. 1961 into the record.

[H.R. 1961 follows:]

99TH CONGRESS
1ST SESSION

H. R. 1961

To amend section 16 of the Small Business Act.

IN THE HOUSE OF REPRESENTATIVES

APRIL 3, 1985

Mr. MITCHELL introduced the following bill; which was referred to the Committee on Small Business

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A BILL

To amend section 16 of the Small Business Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Subsection (a) of section 16 of the Small Business Act (15 U.S.C. 645) is amended by—

(1) striking "$5,000" therefrom and by inserting in lieu thereof "$50,000";

(2) striking "two" therefrom and by inserting in lieu thereof "five";

(3) striking "Administration" therefrom and by inserting in lieu thereof "United States"; and

(4) inserting immediately after "Act," the following: "including any contract or subcontract subject to

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the provisions of this Act or any other provision of law which refers to section 8(d) of this Act for a definition of eligibility,".

Mr. MITCHELL. May we start off with Mr. Webber.

TESTIMONY OF ROBERT B. WEBBER, GENERAL COUNSEL, SMALL BUSINESS ADMINISTRATION, ACCOMPANIED BY ISAIAH WASHINGTON, ACTING ASSOCIATE ADMINISTRATOR FOR MINORITY SMALL BUSINESS, AND MARTIN D. TECKLER, DEPUTY GENERAL COUNSEL

Mr. WEBBER. Good morning, Mr. Chairman. I am accompanied by Isaiah Washington, our acting Associate Administrator for Minority Small Business, and Martin Teckler, our deputy general counsel.

It is a pleasure to be here this morning to discuss H.R. 1961.

The intent of this bill is to deter the utilization of front companies in the Government's small and disadvantaged business contracting programs by imposing stiffer criminal penalties within section 16(a) of the Small Business Act than are presently contained within that section. Specifically, the bill would subject anyone who knowingly makes a false statement for the purpose of, in any way, influencing the action of the United States, or for the purpose of obtaining anything of value under the Small Business Act, including any contract or subcontract subject to the provisions of the Small Business Act, or any other provision of law which refers to section 8(d) of the Small Business Act for definition of eligibility; to a fine of not more than $50,000 or by imprisonment of not more than 5 years, or both.

Section 16(a) of the Small Business Act has been in existence since 1953. Our office of inspector general advises that a relatively small percentage of the criminal fraud referrals for prosecution that SBA makes each year to the Department of Justice contain account based upon this provision. Over the years, a significant body of case law has developed involving this provision. But it cannot be characterized as extensive.

Mr. Chairman, we applaud your efforts to eliminate the spectre of front companies from Government contracting programs. Nothing is more detrimental to our interests or those of the small and minority business contract community than the imposition of these unscrupulous charlatans into the 8(a) subcontracting and set-aside programs. We are totally opposed to it and have diligently sought to eliminate it by using our present statutory and administrative authority. In this regard, we have come a long way toward that goal since the early days of the 8(a) program, to the point where the front program is no longer a major one relative to SBA's programs.

The problem with fronts in the 8(a) program is far less prevalent now than in the early 1970's. We have established rigid regulations and SOP guidelines which have enabled us to be successful in identifying and declining front companies in the 8(a) application process. When we become aware of front or control problems after a company is approved for 8(a), we initiate action to terminate the company from the 8(a) program. Similarly, we have not experienced a significant problem with fronts relative to our subcontracting program since its inception in 1978. However, we recognize that we must continue to be diligent and welcome your interest and assistance in this effort.

We do, however, have some comments regarding the effect of this bill as crafted. First, it is somewhat inconsistent with the present version of its parallel provision in the Criminal Code, 18 U.S.C. 1001. Our legal research has shown that a multiplicity of similar though inconsistent charges in an indictment or referral for prosecution can lead to dismissal of individual charges by a court or declination of prosecution by the Department.

In addition, as you know, the Federal Criminal Code has been under revision for some time and program fraud has been one of the objects of that revision. It would perhaps be wiser to leave the fashioning of a comprehensive provision to correct the evil that you are aiming at to that process rather than to incorporate what might turn out to be an inconsistent provision into the Small Business Act.

Finally, section 16(a) of the Small Business Act, even as it would be amended by H.R. 1961, relates to all of SBA's programs, not just our subcontracting or contracting programs. Amending this provision by including a reference to section 8(d) of the act and making it applicable to the entire Government might result in some confusion as to its applicability to SBA's noncontract programs. Perhaps incorporation of the content of H.R. 1961 into a provision of title 18 of the United States Code in conjunction with the reform of the Federal Criminal Law would render a cleaner cut provision, rather than amending the Small Business Act provision.

All in all, Mr. Chairman, we certainly favor the intent behind H.R. 1961. I hope that our comments will be constructive in dealing with the problem, and I shall be pleased to answer any questions.

Mr. MITCHELL. Thank you very much. We will hear Mr. Marquez, and then I will have one or two questions.

TESTIMONY OF JIM J. MARQUEZ, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION, ACCOMPANIED BY BOB ASHLEY, ASSISTANT COUNSEL

Mr. MARQUEZ. Thank you, Mr. Chairman.

My name is Jim Marquez, general counsel of the Department of Transportation. I, as well, am pleased to be here today, and I am accompanied by Bob Ashley, one of my assistant counsels.

As you recall, when I last appeared before your committee on June 5, you asked for our views on your bill, and at that time I had not had an opportunity to see it. However, I have seen it since then, and I can tell you that in principle we strongly support your bill. It is our belief that only legitimate disadvantaged businesses should participate in our programs and that front firms and others which try illegitimately to take advantage of the programs should be screened out of the program and, when the law and the facts are there, it is appropriate that they should be penalized. We also agree, as well, that we also have to remain constantly vigilant against front organizations.

We support the intent of your bill to increase the penalties for fraud and abuse in the DBE Program. However, I would like to draw your attention to a couple of sections of the bill and offer some technical comments very much along the lines that Mr. Webber has talked about.

The bill would amend section 16(a) of the Small Business Act by increasing the maximum penalties under the statute from $5,000 and 2 years to $50,000 and 5 years. Now, we do believe that these increases in penalties would increase the deterrent value of the statute for Small Business Administration programs, as well as those of the Department. The availability of stiffer fines and sentences will impress upon potential abusers of these programs that the Federal Government is serious about dealing with their conduct. However, as Mr. Webber has mentioned, we think that your attention should be drawn to the Comprehensive Crime Control Act of 1984 which did significantly raise the maximum fines and prison terms which may be imposed on felony violations of Federal criminal statutes.

Since that particular act has increased the amount of penalties that can be imposed, it may be well that the fine levels of your bill can be made comparable to those under the Crime Control Act of 1984.

With respect to the portion of your bill wherein you substitute the "United States" for the word "Administration," we interpret that to mean that "Administration" means SBA and by including it—by changing it to the "United States" that would bring into play the fact that fraudulent statements or misrepresentations made to Federal agencies would come under the ambit of that particular statute. However, under the DBE Program with the Department of Transportation, in view of the fact that most of these statements are made to State and local governments which are the recipients, it may not necessarily bring them under the ambit of this act if you simply change it to the "United States." That shortcoming may not be that significant, however, because in any event 18 U.S.C. 1001 would cover that situation.

Other than that, Mr. Chairman, I think that in general you can expect our support for your bill.

[Mr. Marquez' prepared statement follows:]

PREPARED STATEMENT OF JIM S. MARQUEZ, GENERAL COUNSEL, DEPARTMENT OF TRANSPORTATION

I am Jim J. Marquez, General Counsel of the Department of Transportation. I am pleased to be here today to discuss the Department's views on H.R. 1961 a bill which the Chairman has introduced to amend section 16 of the Small Business Act.

You mentioned this bill to us in the course of the Subcommittee's June 5, 1985, hearing concerning the Department's disadvantaged business enterprise (DBE) program. I stated at that time that we support the general concept of increasing penalties for fraud and abuse in the DBE program.

The Department is strongly in favor of the principle that only legitimate disadvantaged business should participate in our programs, and that front firms and others which try illegitimately to take advantage of the program should be screened out of the program and, where the law and the facts make it appropriate, penalized. I believe that the Department has made reasonable efforts to ensure that only legitimate firms are certified for participation. We must remain vigilant against fronts, but the Department of Transportation does not believe that abuses of this kind undermine the need for a carefully designed program. We also do not believe that the fact that some fronts undoubtedly exist should undermine current efforts to improve opportunities for legitimate disadvantaged businesses in our financial assistance programs.

We support the intent of the bill to increase the penalties for fraud and abuse in the DBE program. However, I would draw to the Subcommittee's attention a few technical comments.

The bill would amend section 16(a) of the Small Business Act by increasing the maximum penalties under the statute from $5,000 and two years to $50,000 and five years. We believe that these increases in penalties would increase the deterrent value of the statute for Small Business Administration (SBA) programs as well as those of the Department. The availability of stiffer fines and sentences will impress upon potential abusers of these programs that the Federal government is serious about dealing with their conduct.

We would, however, call to the Subcommittee's attention recent legislation amending the provisions of the Federal criminal statutes concerning fines and incarceration. The Comprehensive Crime Control Act of 1984 (Pub. L. 98-473; October 12, 1984), as amended by H.R. 5846 (Pub. L. 98-596; October 30, 1984), significantly raises the maximum fines and prison terms which may be imposed for felony violations of Federal criminal statutes. Under these statutes, an individual may be fined up to $250,000 for a felony; an organization, up to $500,000. The court also has the discretion to fine the defendant up to twice the amount of any gross pecuniary gain he has obtained, or loss he has caused another, as the result of his offense. The legislation also provides for increased prison sentences. It is our understanding that these provisions apply to felony violations of all Federal criminal statutes.

Because section 16(a) already calls for a sentence of up to two years imprisonment, violation of the statute involves a felony. It is possible, therefore, that some or all of the penalty increases proposed by the bill have already been achieved by the more general sentencing legislation. Perhaps what is needed is to conform the fine levels in your bill with the higher levels Congress enacted last year.

The proposal to substitute the words "United States" for the word "Administration" may facilitate the prosecution of some cases, under SBA programs, where false statements or other fraudulent representations are made to Federal agencies other than the SBA itself (e.g., a firm makes a false statement to DOT in connection with a solicitation for an 8(a) contract). However, we believe that this change in the statute would have limited application to our disadvantaged business enterprise program.

With the possible exception of a false statement made directly to the Department in connection with a certification appeal or third-party complaint under 49 CFR § 23.55, any false statement or representation under the DBE program would be made to influence the action, not of the United States or any Federal agency, but of a state or local government agency that received financial assistance from the Department. Consequently, this amendment to the statute's language would not bring the conduct within the ambit of the statute and its criminal penalties. We do not believe that this would be a serious problem, however, since the broad sweep of another statute 18 U.S.C. § 1001, provides penalties for fraudulent statements regarding any matter under the jurisdiction of the United States.

The final provision of the bill is probably the most important one in terms of the statute's applicability to the Department's DBE programs. The present language of the statute applies to actions taken for the purpose of obtaining money, property or value under the Small Business Act. The bill would add, after the word "Act," the words "including any contract or subcontract *subject to* the provisions of this Act or any other provision of law which refers to section 8(d) of this Act for a definition of eligibility." [Emphasis added.]

The intent of this language is clearly to cover misconduct in connection with contracts and subcontracts let by state and local recipients of financial assistance under the Department's highway and transit programs. These programs are affected by section 105(f) of the Surface Transportation Assistance Act of 1982, which provides that

> Except to the extent that the Secretary determines otherwise, not less than ten percent of the amounts authorized to be appropriated under this act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals as defined by section 8(d) of the Small Business Act. . . . Section 105(f) clearly refers to section 8(d) of the Small Business Act for a definition of eligibility.

We would raise the question, however, of whether, strictly speaking, a contract let by a state or local government agency receiving financial assistance from the Department's mass transit or highway programs is "subject to" section 105(f). Section 105(f) can be construed essentially as a direction from Congress to the Secretary of Transportation to ensure that the appropriate funds are expended with disadvantaged businesses. It does not, on its face, directly impose any obligations on state or local financial assistance recipients or make their contracts "subject" to its provisions.

While the intent of this provision of the bill is clear to us, a criminal statute must be construed strictly. It is conceivable that a court might accept a defendant's argument that the statute did not reach an allegedly false statement he made with the purpose of securing a DBE subcontract on a state or local Federally-assisted highway or mass transit project.

We believe that this potential statutory construction problem could be avoided by rewording the proposed amendment to read "including any contract or subcontract subject to the provisions of this Act, or made available in accordance with any other provision of law which refers to section 8(d) of this Act for a definition of eligibility."

This alteration of the amendment would make the penalties of section 16(a) clearly applicable to misconduct in connection with obtaining DBE contracts made available as part of STAA financial assistance programs.

Thank you for the opportunity to comment. I will be pleased to respond to your questions at this time.

Mr. MITCHELL. Gentlemen, thank you very much. You have made some good recommendations and I would like to give a brief reaction to them.

First of all, the recommendation concerning the nonconformity with existing law has some merit. However, I think, as both of you may know, the revision of the Criminal Code is never complete. There will be another revision next year and another revision after that; it is an ongoing process. Therefore, I do not feel necessarily constrained to be in conformity with existing law.

Above and beyond that, it just seems to me that as is true in general criminal practice, if you have a specific act then you can apply a specific penalty to that act. And, therefore, in light of the fact that we are dealing with an ever-changing phenomena, the revision of the Criminal Code, and in light of the fact that we do have a very specific act, I do not have major problems at all in dealing with a specific criminal penalty under this bill.

One additional problem, and all of you are familiar with the legislative process on the Hill, if indeed we move it to be in complete conformity with the existing criminal law, then you get into that horrendous problem of sequential referral to various other committees of the House; and Lord knows when we would act on it. Obviously, if we amend the Criminal Code the Judiciary Committee would have jurisdiction over that. But approaching it as we are, it is strictly within the jurisdiction of this Small Business Committee.

I think it is a good recommendation, but I think the realities of the situation would spur me to stick with my original position in the legislation.

You were—yes, sir?

Mr. MARQUEZ. I might add that at one time I used to be a U.S. attorney and have prosecuted many cases that had been referred to me by various governmental agencies. For whatever it is worth, in my personal experience, many times we found ourselves really using 18 U.S.C. 1001 because it was easier to make a case based on a false statement made rather than through a specific statute relative to a specific section or relative to a specific agency. I only throw that out to you for your consideration.

Mr. MITCHELL Yes; and, obviously, what I am proposing still leaves a great deal of discretionary authority within the Justice Department as to which approach it can best use with the greatest facility and in the most expeditious manner.

Mr. MARQUEZ. That is correct.

Mr. MITCHELL. So that is not a major difficulty.

I just want to ask you one other question. You said—I think I heard you say there was maybe some question in your mind about whether or not these provisions would apply to the Surface Transportation Act, whether technically they would apply.

I think they do.

Mr. MARQUEZ. That is correct. I only raise it as a technical point in this respect. Of course, any time you are dealing with a criminal statute, the court looks to see whether you are, in fact, talking about a specific violation; the factors that go into making a crime are quite specific. The only reason I raised that was that it is possible that defense counsel could come in and say: "Well, I made this statement to a State agency. I did not make it directly to the Federal Government. Therefore, it is not a violation of Federal law." Now, it could be a violation of State law. I am not addressing that. However, I think in that respect, there is always the possibility that you have vagueness in that criminal statute. That was my concern.

As a matter of fact, I did not in my testimony address another concern that I had because I think my statement will speak to that. And that is, when you say if it is subject to 105(f), it might be best if that were amended to say subject to—let me give you the exact wording.

You had proposed to say "that it would be a violation for a false statement, including any contract or subcontract, subject to the provisions of this act or any other provision of law which refers to section 8(d) of this act for a definition of eligibility."

Someone could make the argument that 105(f) does not necessarily cause a contract to go to a minority person. My concern was if you do not make it a crime—I'm not saying this very well. What I want to say is that if you amend it to say that if they make a false statement on any application or any contract where money would be made available as a result of 105(f) that it would be a violation. I think that would strengthen your act.

Mr. MITCHELL. I think your point is well taken; I do. And I think we will amend that. It is a good point.

Mr. Webber, let me present you with just one hypothetical situation. Suppose you had a small disadvantaged business concern that had been unsuccessfully marketing its product with a large defense prime contractor for a few years. It is further assumed that our small disadvantaged business has reason to believe that the present supplier to the large business for that product is a front operation. In your opinion, under existing law, does our legitimate small disadvantaged business have standing to go into Federal Court to enjoin the front firm from misrepresenting its status?

Mr. WEBBER. No; it does not.

Mr. MITCHELL. It does not.

Would that be your opinion, also?

Mr. MARQUEZ. Yes.

Mr. MITCHELL. You say it does not. Would not the purpose of the statute be better served if we amended H.R. 1961, my bill, to allow these private attorneys general to self-police programs by filing civil suits? What would be your reaction? They are prohibited

under existing law. If we could come up with something to empower them to file a civil action, what would your reaction be to that?

Mr. WEBBER. That is a possibility, Mr. Chairman. I am thinking of the position of the Government in such litigation. Would the Government be a party? I don't think it would.

Mr. MITCHELL. No, no; this would be an individual civil action.

Mr. WEBBER. I would have to think about that and give you a memorandum.

Mr. MITCHELL. Would you let me know as quickly as possible on that?

Mr. WEBBER. That is a very good suggestion. I would like to do some research and suggest some language.

Mr. MITCHELL. We are going to pass some tougher, stiffer penalties; there is no question about that. But I am concerned over the attitude of the Justice Department in not prosecuting the cases that are referred to them. And I know Justice says that the law is vague in spots and they do not know how to prosecute, all that kind of stuff; but they do. But maybe if we have a double-pronged approach to allow for civil action that might be beneficial in light of the lack of prosecution that has taken place by Justice.

Could I get your reaction to that?

Mr. MARQUEZ. Yes; we will be glad to respond.

Mr. MITCHELL. You do not want to do it now?

Mr. MARQUEZ. No; I would like to think about it and respond, if you don't mind.

Mr. MITCHELL. The trouble with lawyers——

Mr. MARQUEZ. Well, we get in a lot of trouble all the time.

Mr. MITCHELL. Gentlemen, there are no other members here—yes?

Mr. WEBBER. Mr. Chairman, like Jim, I have had an afterthought.

I was thinking that the present section 16(a) is fairly well directed toward overvaluation of collateral and other lesser crimes, and I believe the lesser penalty probably is more appropriate. Second, I feel that trying to work this quite different crime into section 16(a) results in a confusing paragraph.

I would suggest that we attempt to draft a subparagraph (d), a new subparagraph (d), directed only to this problem, and that we then in that subparagraph (d) correct the concerns that Mr. Marquez has. Also, I have a concern whether the present language would actually really get to the problem because the person who usually makes the false statement in these front operations is the disadvantaged person. It might be that that person would be the only one who could be prosecuted when, in fact, the real culprit is the party who has put him up to it. The statement made to the United States is not generally coming from the conspirator, so to speak; it is coming from the disadvantaged person. I am afraid we might end up prosecuting the disadvantaged persons and not the greedy individuals who would abuse the program.

Mr. MITCHELL. You may be right, but it certainly seems to me when you have front companies, generally, it is a prime involved with a subcontractor; that prime enters into an arrangement with the sub. The sub may make the statement, but I think we could possibly approach it in terms of a conspiracy kind of thing, where

the prime has knowledge of the fact that the sub is making the false statements and goes ahead and utilizes that sub anyway.

Yes? Go right ahead.

Mr. MARQUEZ. I understand what you are getting at. I only point out that in trying to prosecute as a conspiracy creates many more difficulties for a prosecutor. It is very difficult to prove a conspiracy although I am not suggesting that it should not be done, or that that approach should not always be available. It just makes it much more difficult, given Bob's scenario, to get the real culprit who may have put the minority individual up to making a false statement. It may be much more difficult.

Mr. MITCHELL. God has blessed me by not making me an attorney. Although I am not, I have been around attorneys, worked with the law, worked with the courts for a large part of my life. There are a couple of things; it is going to be difficult to make the complete airtight case where you get the real culprit and where the penalty is entirely appropriate.

But I have just one other statement to make. I think the mere presence of the change in the statute is going to be of enormous deterrent value. People did not care about 2 years in jail. The culprit can do that standing on his head. Five thousand dollars, if they have a hundred-thousand-dollar contract, they write that off that penalty as a kind of an operational expense.

I think by increasing the term of imprisonment and the fine we would have a rather salutary deterrent effect.

Counsel has pointed out one case in Georgia where two prime contractors were found guilty of making false statements to the city of Atlanta concerning minority business participation. I don't know the size of the contract, but the two of them were fined $500 each. They are going to pay that and go right back to business. It is like the old lottery operation that used to exist in urban areas. People who were found guilty of numbers running just paid off the chief barons in the numbers racket and they went right back to work; the fines were paid.

So I guess my bottom line is that we will move very quickly on your suggestions for amendments. And I would like to do that as quickly as possible because I want to mark up our bill, our Omnibus bill the following week, and I think perhaps the cleanest way to do this is to merely put this on as an amendment to the Omnibus bill.

I know it is a Fourth of July weekend and all of that. But by Monday, a week from, does that give you time?

Mr. MARQUEZ. We will be glad to work with you in any way that you like.

Mr. MITCHELL. Great.

Unless you have some other statements, I will close the hearing with my usual statement that expresses my concern: I look forward to visiting them in jail. It would give me immense and almost immeasurable pleasure to go to the jail cell to see the culprits housed together.

Gentlemen, thank you very much. The hearing is now adjourned.

[Whereupon, at 10:30 a.m., the subcommittee adjourned, to reconvene subject to call of the Chair.]

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